89-797

No. 89-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

Don Pierce; Cal's Auto Supply Co., Inc.; Vega Auto Parts, Inc.; Tampa Engines, Inc.; Tampa Automotive, Inc.; and Danko Auto Parts Corporation, d/b/a Bob's Auto Parts,

Petitioners,

v.

Commercial Warehouse, Div. of Thompson Automotive Warehouse, Inc., a Florida corporation, et al.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Additional Respondents include:

Parts and Equipment Distributors, Inc., a Florida corporation; Tampa Brake and Supply Co., Inc., a Florida Corporation; EMB Brake and Automotive Supply, Inc., a Florida corporation; United Equipment Sales, Inc., a Florida Corporation; Bendix Aftermarket Brake Division, Inc., a Tennessee corporation; Fel Pro., Inc., an Illinois corporation; Sealed Power Corporation, a Michigan corporation; Federal Mogul Corporation, a Michigan corporation; Gates Rubber Co., Inc., a Colorado corporation; Wagner Div., McGraw-Edison Co., a New Jersey corporation; and Arrow Automotive Industries, Inc., a Massachusetts corporation.

Questions Presented

1. Does the Robinson-Patman Act prohibit a supplier from granting a "functional" discount to a favored dual distributor, which the dual distributor utilizes to compete against a disfavored distributor of the supplier's products, when the discount is not justified by reduced costs to the supplier?

2. Does a supplier "indirectly" discriminate in price between its competing direct and indirect distributors under the Robinson-Patman Act, when it creates, delivers, and has the contractual right to control two-tier resale price lists?

3. Is summary judgment, pursuant to Rule 56, F.R.Civ.P., appropriate when the intention and motivation of parties to distribution contracts are materially

disputed, and plaintiffs' allegations of price discrimination are economically plausible?

Interested Parties

The parties interested in this proceeding are those indicated on the cover of this petition, plus the following affiliates:

I. Federal-Mogul Corporation

Federal-Mogul Corporation has a number of foreign subsidiaries, as well as the following domestic subsidiaries:

Carter Automotive Company, Inc.
Federal-Mogul World Trade, Inc.
Huck Manufacturing Company
Huck World Wide, Inc.

Kemmer Corporation
Mather Seal Company
Metaltec, Inc.
Switches, Inc.

II. Fel-Pro Incorporated

Fel-Pro Incorporated is a wholly-owned subsidiary of Felt Products Manufacturing Co. Fel-Pro of Canada Limited is another wholly-owned subsidiary of Felt Products Mfg. Co.

Fel-Pro Realty is an affiliated company owned by the same shareholders as Felt Products Manufacturing Co. All of these companies are privately owned.

III. The Wagner Division, Cooper Industries

Wagner is a division of Cooper Industries, Inc., Houston, Texas. The McGraw-Edison Co. is also a division of Cooper.

IV. Allied Corporation

Allied Corporation is a wholly-owned subsidiary of Allied-Signal Inc. The Bendix Aftermarket Brake Division is an unincorporated division of Allied Corporation. Allied-Signal Inc. also has a number of foreign subsidiaries, as well as the following domestic subsidiaries, affiliates, and partnerships:

Airsupply International
Allied Chemical International Corp.
Allied Chemical Nuclear Products, Inc.
Allied-General Nuclear Services

Allied-Signal China, Inc.
Allied Signal International Finance Corporation
Allied-Signal International Inc.
Bayfield Corporation
Bendix Field Engineering Corp.
Bendix International Service Corp.
Bendix Transportation Management Corporation
Endevco Corporation
Fluid Systems
Garrett Airline Repair Company, Inc.
Garrett Comtronics Licensing Corp.
Garrett Comtronics Corporation
Grampian Properties, Ltd.
International Turbine Engine Corp.
King Radio Corporation
Leaseway All-Services, Inc.
Linotype Italy
Neptune Environmental Measurement, Ltd.
Norplex/Oak Inc.
Oak Mitsui Inc.
Parfield, Inc.
Realdix Corporation
Remtex Manufacturing, Inc. - U.S.
Transducer Technology, Inc.
UOP Asia Ltd.
UOP Inc.
UOP Inc. (Allied Holdings Co.)
UOP Inter-Americana, Inc.

V. Arrow Automotive Industries, Inc. Arrow Automotive Industries, Inc. has the following subsidiaries: Carbco Industries and Icepac, Inc.

VI. Gates Rubber Co. Inc.

Gates Rubber Co. Inc. is a subsidiary of The Gates Corp.

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Petition for A Writ of Certiorari

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., infra) is reported at 876 F.2d 36. The opinion of the District Court (App. D., infra) is reported at 691 F. Supp. 291.

JURISDICTION

The Judgment of the Court of Appeals

(App. B., infra) was entered effective June 27, 1989 and issued as a mandate on September 19, 1989. The Court of Appeals' Order denying a timely filed petition for rehearing (App. C., infra) was entered on September 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. S 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 2(a) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a) and (f), are set forth in their entirety in the opinions of the Court of Appeals and District Court, reproduced herein at App. A. 2-4 and App. D. 5-7.

Rule 56(c), F.R.Civ.P., provides, in relevant part, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT

1. Seven of the 12 named defendant-respondents herein are national manufacturers of automobile parts. App. A-2[1]. Historically, they distributed their products directly through independent wholesalers, referred to as "jobbers," such as the six plaintiffs-petitioners, App. D. 2,3; the jobbers in turn would distribute the products to garages and retailers. As the industry matured, however, the manufacturers added an additional intervening link to their

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[1]References are to the Appendices hereto ("App. ") or to the Record ("R. ") in the Court of Appeals.

distribution chains: they sold their products to local warehouse-distributors ("WDs"), such as the first five defendant-respondents herein. The WDs were established to provide decentralized warehousing functions to the manufacturers and to distribute the manufacturers' products, upon request, to the jobbers. See, generally, the description of the distribution practices in the automobile parts industry contained in Purolator Products, Inc. v. Federal Trade Commission, 352 F.2d 874, at 877-78 (7th Cir. 1965), cited at App. A-6, fn. 2; App. D. 10-14.

The manufacturers do not intend that the WDs sell directly to retailers in competition with their jobber-customers. For example, defendant Fel-Pro stated in its answers to interrogatories that,

"Fel-Pro does, however, require WDs who wish to receive the discount referred to above to certify in writing, among other things, that they do business only at the jobbers level and make no garage or dealer sales . . . This discount is granted only with respect to resales made to jobbers," R-7-213, Ex.C. Moreover, the distribution contracts between manufacturers and WDs empower the manufacturers to control jobber prices, App. D-21-22. See, e.g., R. 7-213, Ex. N (Warehouse Distributor Contract of Gates Rubber Company).

The dispute in this case arose because the WDs declined to honor their "certifications," Fel-Pro and the other manufacturers declined to limit the discounts offered to their WDs, and yet the WDs did generally adhere to the

resale price structure for jobbers created by the manufacturers' use of jobber resale price lists.

2. The manufacturer-defendants in this case have created price lists and regular price-change lists for their products. App. A-8. Those lists routinely contain "jobber prices" -- prices jobbers are to pay to the WDs for the manufacturers' products -- as well as "warehouse discounts" off jobber prices. The warehouse discounts in this case ranged from 23% to 38%, R. 7-213. In other words, the WD defendants paid the manufacturers 23% to 38% less than the "jobber prices" listed on the price sheets circulated by the manufacturers.

Upon receiving their price discounts, the WDs resold the products to the jobbers, for the most part, at the

"jobber" prices: "That is your basic price sheet for all jobbers and warehouses, right there, whether it says 'suggested' or not . . . all warehouses charge you this [manufacturers' jobber] price, period . . . (deposition of Daniels, R. 7-213, exhibit G., p. 3). The WDs claimed, however, that the price lists were not always exactly adhered to and/or that the WDs were not "coerced" to adhere to the price sheets -- they independently made the decision to rely upon the manufacturer's price sheets, so that there was no vertical price-fixing agreement that would violate the Sherman Act, 15 U.S.C. 1, App. A-8; App. D-23.

The jobbers, testified that, in practice, the WDs billed according to the price sheets "to the penny," Boyle deposition R-7-213, Ex.H. p. 1. "The

manufacturer decides what price. They put it out in a price sheet," Pellage deposition, R.-7-213, Ex.I., pp 1-3.

Not only do the WDs generally adhere to the "jobber prices" contained in the manufacturers' price lists, those price lists are delivered directly to the jobbers by the manufacturers' sales representatives. Employees of the manufacturers assure that the jobbers (as well as the WDs) "have current price sheets in our catalog racks," which the manufacturers deliver directly, R-7-213, Ex.I., p. 1. "Manufacturers have come in and put the price sheets in and said, 'These are your new price sheets,'" R-7-123, Ex.J.

Moreover, the manufacturers' sales agents occasionally utilized the price sheets to "take purchase orders from you

in order to give them to the warehouses that you buy from," R.7-213, Ex.K. For example, the "Field Sales Manual" of defendant McGraw-Edison contains a specific chapter for "selling jobbers" and "new jobbers," R.7-213, Ex.L. pp. 1, 4. The manufacturer-defendants' employees are trained to "solicit prospective customers and send them through the chain of distribution," id. at 7, also utilizing its jobber price lists.

3. Evidence of WD abuse of their "functional discounts" and manufacturer resale price lists, along with the anticompetitive effect of that abuse, was undisputed. The WDs in this case "competed" directly against petitioners in the Tampa, Florida market by selling the manufacturers' products to the

jobbers at the "jobber prices" established by the manufacturers, and at the same time using their substantial discounts to sell directly to the jobbers' customers at below jobber prices, R. 6-201, 1, 2: "3. Within the past twelve months I have learned through my customers as well as from my own sales people, that [defendant] Parts and Equipment and [defendant] EMB are utilizing their functional discounts received from the manufacturers to sell the same products I sell to my customers at or below my cost. I am not able to compete with this price advantage these Warehouse Distributors enjoy and therefore have lost and continue to lose my customers to them. 4. Under the existing circumstances, I do not know how much longer I can keep my doors open,"

affidavit of William McAleer, R. 7-213, Exhibit A.

Such a competitive strategy is expressly recognized to be illegal by defendants' own trade organization, the Automotive Service Industry Association (A.S.I.A.), which announced in an official position paper that, "Dual distribution is not illegal -- but a dual distributor may lawfully receive a wholesale discount only on goods it resells as a wholesaler and not on goods it resells as a retailer in competition with other retailers who do not receive the same discount," R. 7-230-6.

Notwithstanding such a recognition of existing legal requirements, defendant WDs flout their own trade organization. Plaintiffs' Exhibit 22, R. 6-201, is a letter from the General sales manager of

warehouse defendant EMB Brake and Automotive Supply, dated December 11, 1984, to retail customers: "As one of Southwest Florida's largest, most aggressive automotive suppliers, many of our customers often ask us how we can sell at such a low price. The main reason is we are a warehouse distributor and purchase directly from the manufacturer. The average 'jobber store' purchases from a warehouse distributor and then resells to you at approximately 35% gross profit margin (cost x 1.55). This is the reason our prices are so much lower than your local 'parts house.'"

4. Petitioners eventually sued the seven manufacturer-defendants and five WD defendants for secondary-line price discrimination, in violation of Sections

2(a) and 2(f)[2] of the Robinson Patman Act, seeking primarily equitable relief. The equitable relief could have taken any of several forms of judicial decree: (i) That the manufacturers provide equivalent discounts (or rebates) to any jobber who demonstrates that a WD is utilizing its discount to compete directly against it for retail customers (the "competitive justification" approach); (ii) to "trace" through the percentage of WD sales that are made to retailers, rather than jobbers, and recover the WD discount on those sales from the WD, consistent with Fel-Pro's asserted policy, quoted above (pursuant to the manufacturers' contractual right to audit W.D. sales); (iii) to discontinue the use of "two-tier" price lists, so that all

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[2]Reproduced at App. A. 2-4.

wholesalers, regardless of volume purchased, are entitled to buy products at the same price -- either directly from the manufacturer or through the WD; or (iv) to discontinue the use of "jobber" price lists, so that the manufacturers no longer practically control jobber prices, and jobbers realistically can negotiate their prices with competing WDs, thus creating intrabrand price competition at the jobber level.

The first, third, and fourth alternatives above each would have resulted in lower prices to the jobbers and their retail customers and would have been consistent with the Sherman Act's "consumer welfare" goals, as well as the goal of the Robinson-Patman Act to create a "level playing field," to protect smaller distributors. The second

alternative above would not have diminished competition at the wholesale level. Of course, the manufacturers' also could have, as a fifth alternative, enforced their distribution contracts with the WDs by precluding the WDs from selling directly to retailers, outside the established distribution chain. Such an alternative would have been inconsistent with Sherman Act goals, however, and plainly was not the exclusive relief requested by the plaintiffs, contrary to the Court of Appeals' inference, App. A-7, fn. 3.

While pretrial discovery was in progress, defendants moved for summary judgment which, by stipulation, was limited to a narrow, preliminary issue, App. A-4, 5; App. D-5, 11: Whether, because the plaintiffs purchased the

manufacturers' products indirectly through the WDs, the manufacturers were responsible for price discrimination as a result of their use of jobber price lists and discounts off jobber prices offered to WDs, coupled with the dual-distributor practices of the WDs. The lower courts identified this single issue as whether or not the Robinson-Patman Act's "indirect purchaser" doctrine applied, App. D. 5, 10.

5. The District Court on May 6, 1988 entered an "Order on Motions for Summary Judgment," granting the defendants' two consolidated motions with respect to all defendants, App. D.

As the Court correctly noted, "Purchasers" within the language of the Robinson-Patman Act "does not necessarily mean purchasers buying direct from the

seller . . . ," but " . . . when the manufacturer lacks sufficient contact with the indirect purchaser and/or sufficient control over the terms upon which he buys, the latter will not qualify as a 'purchaser' within the meaning of the act," App. D. 10, 14.

The Court found that the written distribution contracts between the manufacturer defendants and WD defendants were facially sufficient to prove manufacturer control of jobber prices, App. D. 21, 23, 24, but declined to attribute significance to the contracts because "the essence of a contract is the understanding between the parties, not the written memorial of that understanding," and defendants submitted affidavits attesting that the contracts were not adhered to, App. D. 24. The

Court did "wonder what function is served by the sales contracts," but declined to "speculate," App. D-25. The Court did "not address the issue of whether the sales contracts are binding documents," id., but concluded that, notwithstanding the contracts, the manufacturers "do not have actual control over the behavior of the WDs pursuant to the sales contracts," id.

The Court next found that the price sheets distributed by the manufacturers, listing jobber resale prices, did not prove that the WDs were "coerced into using the price sheets," App. D-28. Finally, the Court found that the evidence of direct manufacturer contacts with the jobbers, including the delivery of jobber price change sheets, did not prove that the manufacturers "directly

participate in negotiation of price changes between the WDs and plaintiffs," App. D. 37. The Court ultimately held, granting summary judgment for defendants, that, "There is no 'dummy' entity or spurious intermediary involved in the subject transactions," id..

6. The Court of Appeals affirmed the grant of summary judgment, App. A. The Court recognized that the ultimate issue was whether the manufacturers were responsible for price discrimination by granting a functional volume discount to dual distributors which then utilized the discount to compete against disfavored distributors in the manufacturers' distribution chain, App. A-4, 7.

The Court held that the manufacturers were not responsible for price discrimination because, (i) they did not

compel or coerce the WDs to adhere to the jobber price sheets; (ii) the distribution contracts between manufacturers and WDs, which specifically allow the manufacturers to alter both WD and jobber prices, audit WD sales, and terminate WDs for failure to comply with distribution policies, do not practically "control the WDs behavior," App. A-2, 10; and (iii) the "resales of manufacturers' parts from the WDs to the jobbers were [not] sham sales," App. A. 10-11, so that the plaintiffs do not qualify as indirect purchasers from the manufacturers.

REASONS FOR GRANTING THE PETITION

I. THIS COURT CURRENTLY IS CONSIDERING QUESTION ONE PRESENTED HEREIN, ON REVIEW OF A NINTH CIRCUIT DECISION WHICH IS INCONSISTENT WITH THE LOWER COURT OPINIONS IN THIS CASE.

This Court has granted certiorari to

resolve whether a supplier violates the Robinson-Patman Act by granting a functional volume discount to a dual distributor, which then utilizes the discount to compete indirectly against distributors which have not received the discount, when there is no cost justification for the discount, Hasbrouck v. Texaco, 663 F.2d 930, 934 (9th Cir. 1981) (reversing grant of judgment n.o.v. and remanding for new trial); 830 F.2d 1513 (9th Cir.), as amended 842 F.2d 1034 (1987) (affirming verdict for plaintiffs), cert granted sub. nom., Texaco, Inc. v. Hasbrouck, et al., 109 S. Ct. 3154 (June 12, 1989), S. Ct. No. 87-2048.

Question one herein presents the same question and a similar factual situation, requiring an assessment of the language

and basic policy of the Robinson-Patman Act. It is clear from the District Court's Opinion, App. D-18, 32-33, that the Court's resolution was based upon its view that the WDs were entitled to a functional, volume discount for all their purchases, as long as they performed some warehousing function, regardless of their head-to-head competition with disfavored purchasers at the jobber level and the absence of cost justification for the entire discount.

The District Court specifically held that, "Plaintiffs seek to have this Court take away the advantage of the functional discount that is offered by the manufacturer defendants to the Warehouse Distributor Defendants who stock their products by eliminating the discount ... Alternatively, Plaintiffs seek to have

this Court order the Warehouse Distributor Defendants to pass the functional discount . . . on to their customers. This is another form of resale price maintenance, which this Court declines to allow," App. D. 32-33.

Such holding, in addition to its refusal to reconcile Robinson-Patman and Sherman Act goals, where possible, conflicts with the Ninth Circuit's decision in Hasbrouck, where the Court held: "Where, as here, the discount given to a customer higher in the distributive chain is sufficiently substantial and is unrelated to the costs of the customer's function, the seller cannot claim immunity from Robinson-Patman liability," 842 F.2d at 1040. As in the present case, the Court in Hasbrouck was faced with a situation

involving a dual distributor which received favorable prices from the supplier and used that preference to compete unfairly against disfavored sellers of the same product lower down in the distribution chain. As the Court made clear, "The injury . . . results from the receipt by wholesalers of a functional discount in excess of the value of the services they perform, all or a portion of which they then pass on to the retailers they supply," 842 F.2d at 1039.

This Court should grant this petition to consider the important Robinson-Patman Act issue presented herein in the context of the firmly established distribution chains utilized in the automobile-parts industry, or should stay consideration of this petition pending its resolution of

Hasbrouck. The degree of price discrimination in the present case, as well as the abuse of the price preference by the WDs, are far greater here than in Hasbrouck.

II. THE LOWER COURTS' HOLDING THAT THE MANUFACTURERS ARE NOT RESPONSIBLE FOR DISCRIMINATING IN PRICE AGAINST THE PETITIONERS CONFLICTS WITH THE ROBINSON-PATMAN "INDIRECT PURCHASER' STANDARD ADOPTED BY THE SEVENTH CIRCUIT AND FEDERAL TRADE COMMISSION.

In essence, the lower courts held that the manufacturers were not responsible for indirect price discrimination because "the indirect purchaser doctrine of Robinson-Patman Act jurisprudence," App. A-5; App. D-10,11, required proof, absent in this case, that the business of the WDs was coerced or dominated by the manufacturers, so that the WDs merely were alter egos or instrumentalities of

the manufacturers.

The Court of Appeals thus applied a legal standard for the indirect purchaser doctrine requiring a showing that the "resales of manufacturers' parts from the WDs to the jobbers were sham sales . . . ," App. A-10. The Court was persuaded by the absence of evidence that the "WDs are compelled to adhere to the [price] sheets or uniformly follow them," App. A-8. The District Court required proof that the WDs were "dummy" wholesalers, App. D-11, 12, or a "spurious intermediary organized by the retailer," or is "merely a bookkeeping device" and is not "an independent link in the distributive chain," App. D-12. In other words, the lower courts required proof, before a disfavored indirect purchaser may invoke the Robinson-Patman Act, that the

manufacturer totally controls and dominates the business of the direct, favored distributor as its "dummy."

Such a requirement conflicts with the far more practical, less onerous standard recognized by the Federal Trade Commission continuously for 50 years and later approved by the Seventh Circuit in Purolator Products, supra, 352 F.2d at 881, 883, cited at App. A. 6, fn. 2. The Robinson-Patman indirect purchaser doctrine historically has applied

> "where the prices to be charged the indirect purchaser are effectively established by the manufacturer, and where virtually all the conditions and terms upon which the sale is to be consummated are ... subject to [the manufacturer's] approval," 352 F.2d at 881 (emphasis added).

Applying the F.T.C. standard to the facts before it in Purolator, the Seventh Circuit held that Purolator's jobbers, who bought products from warehouses but

not directly from Purolator, were correctly considered "purchasers" from Purolator and were the victims of price discrimination. As subsequently observed, the Seventh Circuit's finding of manufacturer control in Purolator was based upon evidence: "That the manufacturer (1) had at one time had the legal right to control independent warehouse distributor sales; (2) had supplied warehouse distributors with their sales agreements and suggested resale price lists; (3) had solicited the indirect purchasers (the jobbers) and urged them to maintain prices which for the most part they had done; and (4) had directly negotiated franchise agreements and changes in price with the indirect purchasers," Checker Motors Corporation v. Chrysler Corporation, 283 F. Supp.

876, 888 (S.D.N.Y. 1968). The Purolator decision is directly on point with the facts of this case.

The lower Court's "indirect purchaser" requirement also is inconsistent with the legislative history and purpose of the Robinson-Patman Act, which was "to curb and prohibit all devices by which large buyers [WDs] gained discriminatory preferences over smaller ones [jobbers] by virtue of their greater purchasing power," Federal Trade Commission v. Fred Meyer, Inc., 390 U.S. 341, at 348.

The interpretation of the so-called "indirect purchaser" doctrine by the F.T.C. has remained unchanged since it was first applied in 1937, Kraft-Phenix Cheese Corporation, 25 F.T.C. 537, and during the following 40 years through Fred Meyer, supra, and should have

received deference by the lower courts in the present case. The lower courts' requirement of proof of manufacturer dominance of the business of the direct purchaser clearly conflicts with the more practical requirement, satisfied in this case, of proof of ability of manufacturers to control resale prices of otherwise independent distributors. The requirement could never be satisfied when the direct purchaser distributes products manufactured by multiple sellers, contrary to its consistent application in such cases by the Federal Trade Commission, because no one seller would dominate such a multi-product distributor.

In view of the increasing appearance of dual distributors throughout the American economy -- a development which,

itself, has significant pro-competitive potential -- this Court should establish basic guidelines for the right of dual distributors to utilize functional discounts to compete against disfavored indirect purchasers, thereby reconciling the goals of the Sherman and Robinson-Patman Acts as the Federal Trade Commission has attempted to accomplish.

III. SUMMARY JUDGMENT IS NOT APPROPRIATE IN ANTITRUST CASES WHEN THE INTENTIONS OF PARTIES TO ECONOMICALLY PLAUSIBLE WRITTEN DISTRIBUTION CONTRACTS ARE MATERIALLY DISPUTED.

As described above, the WDs for the most part adhere to the jobber price sheets created and circulated by the manufacturers. On the surface, at least, an economically plausible inference arises from the jobber price sheets that the manufacturers do "control," to some extent, resale price levels.

The WDs claimed, however, and the lower courts concluded, that the fact that the prices actually charged to the jobbers often match the manufacturers' price lists is attributable to coincidence or convenience, not manufacturer control. As the District Court recognized, plaintiffs then pointed to the various written distribution contracts between manufacturers and WDs, which appear to be additional evidence of manufacturer control, App. D, 21-22.

For example, the Warehouse Distributor Contract imposed by the defendant, Gates Rubber Company, specifies that, "It is the present intention of the Warehouse Distributor to confine his business in Gates products to the servicing of Gates jobbers and Gates National fleet customers with whom Gates has contracts

entitling such jobbers . . . to purchase automotive products at jobber prices," R. 7-213, Ex. N. (emphasis added). The "jobber prices" in question, of course, are those established by Gates' jobber price sheets.

Federal Mogul insists that its WDs "allow an authorized Federal Mogul representative . . . to audit the WDs invoices and records," with respect to the WDs sales, R. 7-213, Ex. N. Defendant Gates reserves the right to terminate its WDs and further insists that its WDs "pay to Gates promptly any discounts which he fails to support in accordance with this contract," R. 7-213, Ex. N. American Hammered, a division of defendant Sealed Power Corporation, requires its WDs to "furnish to American Hammered monthly reports of sales made to

indirect distributors [jobbers] on forms which will be provided by American Hammered," (emphasis added), R. 7-213, Ex. N. Defendant Bendix provides, in its "Service Distributor Contract" (for WDs) that the benefits provided to the WD "shall be available to all competing customers . . . of service distributor [jobbers] and any breach of this requirement . . . shall be considered a material breach of this agreement entitling Bendix to immediately terminate this agreement," R. 7-213, Ex. N.

In response to that evidence, the District Court held, granting summary judgment on the issue of manufacturer control of resale prices, "The sales contracts provide that the contracts are binding, but all Defendants testify that the sales contracts are never enforced .

. . The Court does wonder what function is served by the sales contracts, but will not speculate . . . This Court will not address the issue of whether the sales contracts are binding documents," App. D-23, 25.

Such a summary judgment holding represents the mischief which lower courts have allowed to occur in the wake of this Court's 1986 summary judgment trilogy. See, e.g., Celotex v. Catrett, 477 U.S. 317, App. D-8, 9; Anderson v. Liberty Lobby, Inc., 477 U.S. 317. This Court clearly did not intend to alter the terms of Rule 56(c), F. R. Civ. P., in Celotex, or when it added an "economic plausibility" screen for antitrust cases in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574. It is time for this Court to correct the mischief,

to protect the Seventh Amendment jury right from undue limitation.

When a material fact is genuinely disputed, even in an antitrust case, summary judgment should remain inappropriate. As this Court has held, a factual dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. A fact is "material" if it might affect the outcome of the suit under governing substantive law. Anderson v. Liberty Lobby, Inc., supra, 477 U.S. 242. In this case, whether the manufacturers can control the jobber prices as contained on their price lists is a material, genuine dispute in light of the existence of the written contracts.

The District Court's response to the written contracts -- a throwing up of

hands and refusal to resolve the intention of the contracts on the question of manufacturer ability to control resale prices -- conflicts with paradigm views of summary judgment when contractual intentions are disputed.

For example, "when the meaning of an agreement is ambiguous on its face and contrary inferences as to intent are possible, an issue of material fact exists for which summary judgment ordinarily is inappropriate [citing cases]," IBEW Local 47 v. South Calif. Edison Co., 880 F.2d 104, at 107 (9th Cir. 1989). See, generally, 3 Corbin on Contracts § 536, at 27-28 (1960). "When a written contract is ambiguous, a triable issue of fact exists as to its interpretation, thus precluding summary judgment" [citations omitted], Leberman

v. John Blair & Co., 880 F.2d 1555, 1559 (2nd Cir. 1989). "If the contract is deemed ambiguous, then the intention of the parties is a question of fact," In re Navigation Technology Corp., 880 F.2d 1491, 1495 (1st Cir. 1989); "Given the ambiguity that exists in the contract . . . the jury must decide the issue," J.I. Hass Co., Inc. v. Gilbane Bldg. Co., 881 F.2d 84, 94 (3rd Cir. 1989).

The District Court recognized that the facially binding distribution contracts in this case would give the manufacturers the power to audit and control WD prices and jobber prices, to demand repayment of "unsupported" discounts, and actually to terminate non-complying WDs. The material factual issue, which a jury should have been allowed to decide, to repeat, is whether the manufacturers

intended to seek and therefore possessed such power over resale prices when executing the contracts: Whether in fact the written contracts gave the manufacturers power to control resale prices. Such an issue genuinely was disputed by the existence of the contracts, themselves.

Moreover, it was entirely "plausible" -- Matsushita, supra -- that on one hand manufacturers would seek to control their distribution chains, yet on the other hand decline to take action against economically powerful warehouse distributors. Such a factual scenario, indeed, was exactly what induced the enactment of the Robinson-Patman Act in 1936. See, Areeda and Kaplow, Antitrust Analysis (4th ed.), pp. 933-35 (1988):

> "The mass-buying chain stores and mail order houses grew greatly after World War I and seemed to imperil

> independent businesses. The chains often purchased directly from manufacturers, dispensed with ordinary wholesalers, and undersold independent retailers. The traditional merchants, threatened with extinction, fought back. While many states acted by imposing special taxes on chain stores, the Federal Trade Commission undertook an extensive investigation . . . [and] concluded that . . . Because the chains' competitive advantage was partly attributed to discriminatory concessions from suppliers, the F.T.C. proposed the F.T.C. proposed that Section 2 be tightened. The Robinson-Patman enactment exceeded the Commission's recommendations and 'superimposed more stringent prohibitions on the existing framework of Section 2 of the Clayton Act.'" [citation omitted]

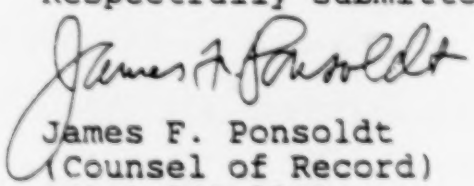
This Court should grant certiorari in this case to resolve the dispute regarding the appropriateness of summary judgment to determine whether written contracts, in fact, reflect the intention of the parties and to reaffirm that this Court has not, in its 1986 summary judgment trilogy, purported to redefine

the accepted meaning of genuinely disputed material facts, in Rule 56, F. R. Civ. P.

Conclusion

This petition for certiorari should be granted. Alternatively, resolution of this petition should be stayed pending the decision by this Court in Hasbrouck, supra.

Respectfully submitted,



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APPENDIX A

Don PIERCE, Cal's Auto Supply Co., Inc., Vega Auto Parts & Machine, Inc., et al., Plaintiffs-Appellants,

v.

COMMERCIAL WAREHOUSE, DIV. OF THOMPSON AUTOMOTIVE WAREHOUSE,INC., a Florida Corporation, Parts and Equipment Distributors, Inc., et al., Defendants-Appellees.

No. 88-3545.

United States Court of Appeals, Eleventh Circuit.

June 27, 1989.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, Chief Judge, HILL, Circuit Judge, and HOWARD*, District Judge.

*Honorable Alex T. Howard, Jr., U.S. District Judge for the Southern District of Alabama, sitting by designation.

PER CURIAM:

The six appellants are jobber-wholesalers of automotive parts in the Tampa, Florida area. Appellees are seven nationwide manufacturers and five regional warehouse distributors (WDs) of automotive parts. In the typical line of distribution, manufacturers sell parts to WDs which in turn resell them to jobbers. Jobbers then resell parts to retailers, including automotive garages and retail parts stores.

In their complaint, the jobbers claimed that the manufacturers and the WDs respectively violated § 2(a) and § 2(f) of the Robinson-Patman Act.[3] After

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[3]Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) provides:
It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in

commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from

discovery, both parties moved for summary judgment and stipulated that the motions be limited to the issue of whether the jobbers had purchased products from the manufacturers at prices higher than those paid by the jobbers' competitors. The district court granted summary judgment for defendants, 691 F.Supp. 291 (1988).

As the district court stated, the basic purpose of Section 2(a) of the

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selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f) provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Robinson-Patman Act is to insure that purchasers from a single seller would not be injured by the seller's discriminatory pricing policies. The complaining party must allege and prove that there were two sales made by the same seller to at least two different purchasers at different prices.

Appellants do not contend that the manufacturers sold directly to them. Rather, they invoke the indirect purchaser doctrine of Robinson-Patman Act jurisprudence that recognizes an antitrust violation when a manufacturer sells indirectly to a jobber through a compliant intervening distributor at a discriminatory price.* Appellants assert

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*The indirect purchaser doctrine was described by the Seventh Circuit in Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045, 88 S.Ct. 758, 19 L.Ed.2d 837 (1968):

> To ensure fair competition among

that the manufacturers sell to the WDs which then act as dual distributors reselling to both jobbers and retailers. The jobbers insist that the manufacturers

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> purchasers from the same seller, the Robinson-Patman Act amendments to the Clayton Act forbade sellers to make price discriminations between purchasers except when justified by economies to the seller. If a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller. If the seller controls the sale, he is responsible for the discrimination i the sale price, if there is such discrimination. If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition. American News Company v. F.T.C., [300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824, 83 S.Ct. 44, 9 L.Ed.2d 64 (1962)].

Id. at 883. See also, Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir. 1969), cert. denied, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); Barnosky Oils, Inc. v. Union Oil Co. of Cal., 665 F.2d 74 (6th Cir. 1981).

control the terms and conditions of the WDs' resales to them; they therefore are indirectly purchasing from the manufacturers which in effect charge one price to the WDs and a higher price to them. They complain that the alleged discriminatory pricing adversely affects their sales to retailers.[5]

Appellants failed to produce evidence to establish that any genuine issue of material fact remains to be resolved. Although the manufacturers issue sheets suggesting resale prices to the WDs, the

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[5]The record makes clear that the principal concern of the jobbers is that they desire to have exclusive distribution rights to sales to retailers. They wish that the manufacturers would enforce the provisions found in some of the manufacturers' sales contracts with the WDs that prohibit the WD from buying parts at discounted prices and then selling directly to retailers. They bring forth nothing to show that the manufacturers' failure to sustain the typical line of distribution violates federal law.

record does not support appellants' allegation that the WDs are compelled to adhere to the sheets or uniformly follow them. The WDs testified that they set the prices at which they resell the parts. Such prices may be higher, lower, or the same as suggested by the manufacturers. Furthermore, on deposition, appellants admitted that they buy parts in volume from the WDs at prices discounted from the suggested prices. Undoubtedly, the WDs find the suggested resale prices useful in determining prices for myriad replacement parts, but there is no evidence that they are consistently followed.

Some of the manufacturers have sales agreements with the WDs that they supply. Provisions in some of the contracts, none of which are enforced, allow manufacturers to audit Wds' sales and

state that Wds are not eligible for warehouse discounts on goods sold directly to retailers; they do not provide manufacturers with any rights to control the terms and conditions of Wds' sales to jobbers. See Windy City Circulating Co. v. Charles Levy Circulating Co., 550 F.Supp. 960, 966 (N.D.Ill. 1982). Appellees further testify that the contracts do not control the WDs behavior, and that the WDs suffer no retribution if a sales contract is not signed. Appellees insist in affidavits that the manufacturers do not in fact monitor the WDs' sales or in any way urge the WDs to conduct their sales in accordance with terms or conditions set by the manufacturers.

Finally, field representatives of the manufacturers directly contact jobbers in undertaking general promotional

activities. Contacts by such "missionary men" do not establish that the manufacturers control the resale of their products. Hiram Walker v. A & S Tropical, Inc., 407 F.2d 4, 6-7 (5th Cir. 1969), cert. denied, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969).

The record does not indicate that the resales of manufacturers' parts from the WDs to the jobbers were sham sales that in truth and fact were controlled by the manufacturers. The indirect purchaser doctrine is inapplicable; appellants have not made out a viable section 2(a) claim against the manufacturers. Likewise, appellants have failed to set forth a viable section 2(f) claim against the WDs.

We have reviewed the judgment of the district court granting summary judgment for appellees and find no error.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3545

D.C. Docket No. 86-203

DON PIERCE, CAL'S AUTO SUPPLY CO., INC., VEGA AUTO PARTS & MACHINE, INC., ET AL.,

Plaintiffs-Appellants,

versus

COMMERCIAL WAREHOUSE, DIV. OF THOMPSON AUTOMOTIVE WAREHOUSE, INC., a Florida Corporation, PARTS AND EQUIPMENT DISTRIBUTORS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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Before RONEY, Chief Judge, HILL, Circuit Judge, and HOWARD*, Chief District Judge.

*Honorable Alex T. Howard, Jr., Chief U.S. District Judge for the Southern District of Alabama, sitting by designation.

J U D G M E N T

This case came to be heard on the transcript of the record from the United

States District Court for the Middle District of Florida, and was argued by counsel; ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 27, 1989
For the Court: Miguel J. Cortez, Clerk
By: Karleen McNabb /s
Deputy Clerk

Issued As Mandate: Sept. 19, 1989

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3545

DON PIERCE, CAL'S AUTO SUPPLY CO., INC., VEGA AUTO PARTS & MACHINE, INC., ET AL.,

Plaintiffs-Appellants

versus,

COMMERCIAL WAREHOUSE, DIV. OF THOMPSON AUTOMOTIVE WAREHOUSE, INC., a FLORIDA Corporation, PARTS AND EQUIPMENT DISTRIBUTORS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the
MIDDLE DISTRICT OF GEORGIA

ON PETITION(S) FOR REHEARING
(Sept. 6, 1989)

BEFORE RONEY, Chief Judge, HILL, Circuit Judge, and HOWARD*, District Judge.

*Honorable Alex T. Howard, Jr. U.S. District Judge for the Southern District of Alabama, sitting by designation.

PER CURIAM:

The petition for rehearing filed by appellant is denied.

ENTERED FOR THE COURT:

James C. Hill /s
UNITED STATES CIRCUIT JUDGE

APPENDIX D

Don PIERCE, et al., Plaintiffs,

v.

COMMERCIAL WAREHOUSE, et al.,
Defendants.

No. 86-203-CIV-T-17.

United States District Court,
M.D. Florida,
Tampa Division.

May 6, 1988.

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

KOVACHEVICH, District Judge.

This cause is before the Court on the following:

Plaintiffs' motion for partial summary judgment, filed on May 22, 1987

Request for Oral Argument, filed on May 22, 1987

Warehouse Distributor Defendants' motion for summary judgment, filed on May 28, 1987

Plaintiffs' request for oral

argument, filed on June 26, 1987

Plaintiffs' response to Defendants' motion for summary judgment, filed on June 26, 1987

Warehouse Distributor Defendants' joint brief in opposition to Plaintiffs' motion for partial summary judgment, filed on June 30, 1987

Manufacturer Defendants' reply brief in support of motion for summary judgment, filed on July 7, 1987

Warehouse Distributor Defendants' reply memo in support of summary judgment, filed on July 8, 1987

FACTS:

The Plaintiffs in this case are Dano Parts Corporation, Cal's Auto Supply, Tampa Engines & Supply, Tampa Automotive, and Gene Vega Auto Parts & Machine. The

Warehouse Distributor Defendants ("W/D's") are Commercial Warehouse, Div. of Thompson Automotive Warehouse, Inc., Parts and Equipment Distributors, Inc. Tampa Brake and Supply, Co., Inc., EMB Brake and Automotive Supply Inc., and United Equipment Sales, Inc. The Manufacturer Defendants ("M/D's") are Bendix Aftermarket Brake Division, Inc., Fel Pro, Inc., Sealed Power Corporation. Federal Mogul Corporation, Gates Rubber Co., Inc., Wagner Div., McGraw-Edison and Arrow Automotive Industries, Inc. All of the M/D's manufacture different products, except that Bendix and Wagner make similar products.

Plaintiffs are automotive parts jobbers who do business in Tampa, Florida. Plaintiffs allege that the Manufacturer Defendants have violated Section 2(a) of the Robinson Patman Act, 15 U.S.C. Sec.

13(a), by selling automotive parts products to Defendant Warehouse Distributors at lower prices than those at which the Manufacturers sell the same products to Plaintiffs, with no cost or competitive justification for the price discrimination.

Plaintiffs also allege that the Manufacturer Defendants have also dealt directly with a minority of preferred jobbers, permitting those jobbers to buy directly from the Manufacturer at the Warehouse Distributor's discount prices, and then to resell at jobber's prices to dealer-consumers. Plaintiffs further allege that the Manufacturer Defendants have knowingly permitted and authorized the Warehouse Distributor Defendants to utilize the Warehouse Distributor's discount in competing with Plaintiffs for Plaintiffs' customers, claiming that this

is secondary line and tertiary price discrimination in violation of Section 2(a) of the Robinson Patman Act.

Plaintiffs further allege that the Warehouse Distributor Defendants have violated Section 2(f) of the Robinson Patman Act, 15 U.S.C. Sec. 13(f), by intentionally inducing and causing the price discrimination activities of the Manufacturer Defendants.

By stipulation, the motions of summary judgment are limited to the issue of whether Plaintiffs have purchased products from the Manufacturer Defendants at prices higher than those paid by Plaintiffs' competitors.

> 15 U.S.C. 13(a) provides:
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchases of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use,

consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchases sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing, to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then to be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall

> prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

15 U.S.C. Sec. 13(f) provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. Sweat v. The Miller Brewing Co., 708 F.2d 655 (11th Cir.1983). All doubt as to the

existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First National Bank of Mt. Pleasant, 595 F.2d 994, 996-7 (5th Cir.1979), quoting Gross v. Southern Railroad Co., 414 F.2d 292 (5th Cir.1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986),

> In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof of trial. Id. 477 U.S. at 322, 106 S.Ct. at 2552-53 91 L.Ed. at 273.

The Court also said, "Rule 56(e) therefore requires that nonmoving party to go beyond the pleadings and by her own

affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, designate 'specific facts showing there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at p. 324, 106 S.Ct. at p. 2553, 91 L.Ed. at p. 274. The Court is satisfied that no genuine issue remains for resolution at trial.

I. VIOLATION OF SECTION 2(a) - MANUFACTURER DEFENDANTS

The basic purpose of Section 2(a) of the Robinson Patman Act is to insure that purchasers from a single seller would not be injured by the seller's discriminatory pricing policies. The complaining party must allege and prove that there were two sales made by the same seller to at least two different purchasers. Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 45, 68 S.Ct. 822, 827-828, 92 L.Ed.

1196 (1948). A sale to one and a refusal to sell to another will not be deemed "sales" to two or more purchasers at discriminatory prices. Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir.1974). Where a manufacturer sells to jobbers at one price and to retailers at another price, a retailer who bought from the jobber has no complaint under the Act because he paid a higher price for the same goods than his retailing competitor who bought directly from the manufacturer. He is not the manufacturer's customer. Klein v. Lionel Corp., 237 F.2d 13 (3rd Cir.1956).

"Purchasers" within the meaning of Section 2(a) does not necessarily mean purchasers buying direct from the seller. Skinner v. U.S. Steel Corporation, 233 F.2d 762 (5th Cir.1956). As the Seventh Circuit has stated:

"If a seller can control the terms

> upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller. If the seller controls the sale, he is responsible for the discrimination in the sale price, if there is such discrimination. If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition."

Purolator Products, Inc. v. F.T.C., 352 F.2d 874, 883 (7th Cir.1965). The thrust of this so-called "indirect purchaser" doctrine is that a manufacturer, by utilizing the subterfuge of a "dummy" wholesaler or distributor, should not be able to evade the price discrimination provisions of the Robinson-Patman Act. Hiram Walker, Inc. v. A & S Tropical, 407 F.2d 4 (5th Cir.1969).

Typical cases where the application of the indirect purchaser doctrine has been upheld arise when a retailer buys

from a "dummy wholesaler" established either by the buyer or seller. If the "wholesaler" is owned by the seller, or is a spurious intermediary organized by the retailer, jobber or a purchasing agent, or is merely a bookkeeping device established by a group of retailers or jobbers, it is not an independent link in the distributive chain and clearly exists solely to support some technical justification or shield for the grant or receipt of an unlawful price benefit. Unfair Competition, Callman, Ch. 7, p. 63.

In Purolator Products, supra, the F.T.C. used the following standards in arriving at its conclusion that jobbers were purchasers of Purolator products:

> "Where the prices to be charged the indirect purchaser are effectively established by the manufacturer, and where virtually all the conditions and terms upon which the sale is to be consummated are fixed by the manufacturer or are subject to its approval, the predicate for a finding that the indirect purchaser is a

> purchaser from the manufacturer has been constructed. Other factors to be considered in arriving at the conclusion are instances of direct contact between the indirect purchaser and the manufacturer, such as direct negotiation of franchise agreements, direct solicitation of orders by the manufacturer's salesmen even though orders are filled by the intermediary, and the manufacturer looks to the intermediary for payment, direct negotiations of changes in price, direct policing of the indirect purchaser's resale prices, direct provision of advertising materials, and inspection by the manufacturer to insure that the indirect purchaser is fulfilling the terms of its agreement with the manufacturer's distributor or wholesaler."

Purolator Products, at 881. In Purolator, the Court upheld a finding of an "indirect purchaser" based on evidence that the Manufacturer 1) had at on time the legal right to control independent Warehouse Distributor Sales, 2) had supplied Warehouse Distributors with sale agreements and suggested resale price lists, 3) had solicited indirect purchasers ("Jobbers") and urged them to

maintain prices which they, for the most part, had done, and 4) had directly negotiated franchise agreements and changes in price with indirect purchasers. See, Joseph A. Kaplan and Sons, Inc. v. F.T.C., 121 U.S. App.D.C. 1, 347 F.2d 785 (1965); Checker Motors Corp., v. Chrysler Corp., 283 F.Supp. 876, 888, (1968), cert. den. 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777.

The question of whether the indirect purchaser doctrine has a legal basis is a mixed question of law and fact. When the manufacturer lacks sufficient contact with the indirect purchaser and/or sufficient control over the terms upon which he buys, the latter will not qualify as a "purchaser" within the meaning of the act. Klein v. Lionel Corp., 237 F.2d 13 (3rd Cir. 1956).

Plaintiffs argue that "since the

resolution of that issue hinges upon the number and quality of contacts between the Manufacturer and the alleged indirect purchaser, it must await trial." K.S. Corp. v. Chemstrand Corp., 198 F.Supp. 310, 313 (S.D.N.Y. 1961). Chemstrand was decided on a motion to dismiss. This Court does not read Chemstrand to require a trial, as long as the facts are sufficiently developed by discovery to allow the Court to decide if there is a genuine factual issue to be resolved. In this case, the defendants have brought forth uncontroverted evidence which establishes that there is no sharp issue as to control.

In Barnosky Oils, Inc. v. Union Oil Company of California, 665 F.2d 74, 84 (6th Cir. 1980), the Court said that the invocation of the indirect purchaser doctrine normally raises a factual issue

not properly resolved prior to trial. However, in Hiram Walker v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir.), cert. denied, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969), the Fifth Circuit reversed the district court's denial of summary judgment for a beverage manufacturer defendant where the manufacturer, who sold beverages to wholesale distributors, did not fix the distributors' resale price to retailers. In Hiram Walker, the Court relied on the following evidence:

> In his deposition submitted on the motion for summary judgment, William G. Benjamin, Sr., President and sole stockholder of plaintiff, admitted that he did not know of a single instance in which Hiram Walker sold directly to any retailer. Furthermore, Binford H. Sykes, General Manager of South Florida, and Elliott Feinberg, President of Florida Beverage, [wholesale distributors] stated in their depositions that prices were set entirely by their own companies and without consultation with Hiram Walker. There was no evidence to the contrary and the facts were

> undisputed. Under these circumstances, appellant Hiram Walker cannot be held liable as a seller within the meaning of the Robinson-Patman Act. [407 F.2d at 8].

A. ADMISSION OF NO DIRECT SALES FROM MANUFACTURER TO JOBBER

Plaintiffs concede that they do not buy direct from the Manufacturer Defendants. There was no evidence to the contrary and the facts are undisputed. Plaintiffs seek to have this Court compel the Manufacturer Defendants to sell directly to them. The application of United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919) prevents that result. Plaintiffs have not offered any evidence of joint action by the Defendants, or evidence of any affirmative agreement among the members of the group not to deal with the Plaintiffs. "[The] right to refuse to deal, the statutory embodiment of the 'Colgate

Doctrine' permeates the entire Robinson Patman Act. One who is not a customer cannot claim the allowance or services which flow from Sections 2(d) and (e)." D. Baum, The Robinson-Patman Act: Summary and Comment, p. 53 (1964). See also, Naifeh v. Ronson Art Metal Works, 218 F.2d 202, 206-7 (10th Cir. 1954). The Manufacturer Defendants are free to choose their customers in bona fide transactions according to the terms of the Act.

Plaintiff has cited Mueller v. Federal Trade Commission, 323 F.2d 44 (7th Cir. 1963) to argue that Defendants are illegally using the functional discount to injure competition. However, that case is distinguishable. Mueller held that the extension of a 25% discount to a "stocking jobber" while giving only a 15% discount to a "regular" jobber might be substantial enough to injure competition. The Court

also found that there were no objective standards to guide the regular jobbers in qualifying as acceptable, and that the Petitioner's decisions to extend the additional discount were based on favoritism rather than objective standards.

The Court is not persuaded that there is an open issue in this case as to what standards the M/D's use to take on a W/D as a customer. Plaintiffs have demonstrated on deposition their knowledge of what a W/D is, and the key requirement of the ability to maintain certain inventory levels and required breadth of product line. Plaintiffs have admitted their inability to maintain such inventory levels and wide variety of products.

To have a viable 2(a) claim under the Act, Plaintiffs must prove two sales to two different customers. If this

threshold is not met, the Court's consideration of the "qualification" issue is misplaced. In the case now before the Court, the same discount is available to all Warehouse Distributors who purchase from the Manufacturer Defendants. The Manufacturers do not sell direct to Plaintiffs. Therefore, the issue becomes whether the Manufacturer Defendants own or control the Warehouse Distributor Defendants, so that the "indirect purchaser" doctrine comes into play.

B. TERMS OF SALE FIXED BY MANUFACTURER OR SUBJECT TO ITS APPROVAL; DIRECT POLICING OF RESALE PRICES; INSPECTION BY MANUFACTURER TO DETERMINE IF INDIRECT PURCHASER IS FULFILLING THE TERMS OF ITS AGREEMENT WITH DISTRIBUTOR; RIGHT TO AUDIT

There is uncontroverted testimony that the W/D's are independently-owned businesses. Plaintiffs admit no knowledge that the M/D's own the W/d's, and Defendants have offered affidavits

establishing no common ownership. Plaintiffs have raised the issue of control, citing the agreements which the M/D's have the W/D's sign upon becoming customers.

The subject sales contracts contain various provisions. The provisions typically include:

1. W/D will allow the M/D to audit W/D's invoices to determine if sales were made to customers, and W/D agrees to maintain supporting information, or furnish monthly sales reports.
2. W/D agrees to confine his business to jobbers who will not be users of the product but will further distribute it or to fleet customers with whom the M/D has a contract.
3. Purchases shall be billed at

distributor net price less a percentage.

In Windy City Circulating Co. v. Charles Levy Circulating Co., 550 F. Supp. 960, 966 (N.D. Ill. 1982), the Court granted summary judgment for defendants and refused to apply the indirect purchaser doctrine in the following circumstances:

> The plaintiffs purchased products, not from national distributors, but from national distributors' wholesalers; in this case, Levy. While there is evidence to suggest that at least some of the national distributors require Levy to provide information concerning draw, return and net sales for accounts served, there is nothing to suggest, much less establish, that these defendants control the price Levy charges the plaintiffs for magazines and paperback books. Indeed, the plaintiffs' theory falls in the wake of uncontroverted affidavits filed by several of the defendants swearing that their respective companies do not control Levy's resale prices and terms of sale.

In the case now before the Court, there are, in some instances, contracts which

purport to control the behavior of the parties, and, in some instances, there are no contracts. Not every contract contains the same provisions. Defendants uniformly deny that the contracts control their behavior. Defendants testify that if a Warehouse Distributor refuses to sign a contract, there are no consequences, and the W/D is nevertheless accepted as a customer. Some Manufacturer Defendants have had contracts in the past that are now superseded, and new contracts have later been signed, and, in some instances, have not been signed. The sales contracts provide that the contracts are binding, but all Defendants testify that the sales contracts are never enforced.

Plaintiffs seek to have this Court find that the Manufacturer Defendants control the setting of price by the Warehouse Distributor Defendants.

Plaintiffs want this Court to compel the Manufacturer Defendants to enforce their sales contract as to the provision that the WD's will sell only to jobbers, and not to Plaintiffs' customers. Plaintiffs implicitly admit that the behavior of the parties is at odds with the written agreements, and the sales contracts are not now enforced. This indicates to the Court that the M/D's do not control the behavior of the W/D's, so as to satisfy the requirements of the "indirect purchaser" doctrine.

The essence of a contract is the understanding between the parties, not the written memorial of that understanding. Defendants have provided uncontroverted affidavits and testimony that the sales contracts are only pieces of paper, and no action is ever taken by the Manufacturer Defendants to require the "contracts" to

be honored, if the Warehouse Distributors do not adhere to their provisions. The Court does wonder what function is served by the sales contracts, but will not speculate in the fact of uncontroverted evidence that no Defendant has ever taken steps to enforce the written agreements, that in some cases there are no written contracts, and there are no consequences if a Warehouse Distributor refuses to sign a sales contract. This Court will not address the issue of whether the sales contracts are binding documents. This Court is only considering the narrow issue of the threshold requirement for a 2(a) claim, two sales to two different purchasers. The uncontroverted evidence before the Court is that the M/D's do not have actual control over the behavior of the W/D's pursuant to the sales contracts.

C. PRICE SHEETS

Plaintiffs allege that because Manufacturer Defendants publish price sheets, the Manufacturer Defendants are setting the price which the Warehouse Defendants charge Plaintiffs. Plaintiffs have further argued that to be competitive with other companies selling the same part, who have set their prices using suggested price sheets, the sellers must abide by the price sheets. Defendants respond that the price sheets are provided only as a convenience in pricing the hundreds or thousands of parts that each Warehouse Distributor sells, because calculating the selling price of each part would be prohibitively time-consuming.

The Manufacturers charge Warehouse Distributors what it costs to produce the product, plus a profit margin, taking into account competition and other relevant factors. In Susser v. Carvel Corporation,

332 F.2d 505, 510 (2d Cir.), cert. granted, 379 U.S. 885, 85 S.Ct. 158, 13 L. Ed. 2d 91 (1964), cert. dismissed as improvidently granted, 381 U.S. 125, 85 S.Ct. 1364, 14 L. Ed. 2d 284 (1965), [the Court] held that an ice cream manufacturer's practice of recommending a retail price to its franchised was lawful where "the franchise provisions explicitly reserved to the individual dealer the right to set whatever price he desired" and where no attempts to enforce the price structure were shown. In the case now before the Court, the Warehouse Distributors have filed affidavits attesting to their freedom to set their own prices. On deposition, those Defendants have testified that some products are priced higher than the suggested price, and some are priced lower. Some Defendants use the price

sheets for every product, and some do not use the price sheets at all, using a computer program to set prices instead. Plaintiffs have not brought forth any evidence to establish that the Warehouse Distributors are in any way coerced into using the price sheets provided by the Manufacturer Defendants.

The suggested price sheets are provided as a convenience to the Warehouse Distributors, and are a "floor," that is, provide a suggested minimum price level that the Warehouse Distributors could use in setting price. See, FLM Collision Parts v. Ford Motor Company, 543 F.2d 1019, 1028 (2d Cir. 1976), cert. denied, 429 U.S. 1097, 97 S.Ct. 1116, 51 L. Ed. 2d 545 (1977). To equate this with control "would reach the absurd result of extending the [indirect purchaser] doctrine to cover every resale of goods."

Id.

The Warehouse Distributor Defendants are free to set their prices at whatever level they choose. The only constraint is economic reality. There is no proof of any coercion by the Manufacturer Defendants which causes the Warehouse Distributor Defendants to choose a certain price level. The marketplace sets the price. Plaintiffs seek to hold the Manufacturer Defendants personally responsible for an economic reality. The products have a certain cost to produce, and the Manufacturers price them to include a profit as well as cover their costs. If the Manufacturers did not provide price sheets, the underlying economic reality of the costs to produce, and the desired profit margin, would not be any different. The only difference would be one of the information, so that

instead of Plaintiffs and W/D's having access to price information from the M/D's, both would be operating in the dark, until enough time had passed for each to independently develop his own price information.

Plaintiffs have complained that the Manufacturer Defendants are responsible for knowingly allowing the Warehouse Defendants to sell products at less than suggested jobber prices, and for not taking any steps to prevent this practice. (Vega Deposition, p. 74; Daniels Deposition, p. 264). Plaintiffs testify that the price sheets are an industry standard, and if prices are not set in accordance with the sheets, Plaintiffs will lose business by failing to offer competitive prices. Plaintiffs want the Court to force the Manufacturers to control the prices set by Warehouse

Distributors and/or to control the customers to which the W/D's sell. In other words, Plaintiffs want this Court to endorse resale price maintenance. This Court declines to do so. Further, in seeking this relief, Plaintiffs implicitly admit that the Manufacturer Defendants do not in fact control the prices set by the Warehouse Defendants, so that the attempt to invoke the indirect purchaser doctrine is not appropriate in this case. Plaintiffs have admitted on deposition that Warehouse Distributors could set prices at any level they want, and that there is no punishment for not using the price sheets. There is no evidence that a Manufacturer has refused to retain a W/D as a customer when the W/D did not use the price sheets, or has coerced the W/D's in any way.

Alternatively, Plaintiffs seek to

have this Court take away the advantage of the functional discount that is offered by the Manufacturer Defendants to the Warehouse Distributor Defendants who stock their products by eliminating the discount. Plaintiffs admit that because of their size, they cannot afford to stock the volume of inventory or broader product lines that the Warehouse Distributors can handle. This Court recognizes the specialized needs of the automotive parts industry, where the necessity for providing car dealers, gas stations and garages with thousands of repair parts on a day-to-day basis has resulted in a complex pattern of distribution and pricing. Section 2(a) of the Act provides that nothing contained therein "... shall prevent differentials which make only due allowance for differences in the costs of manufacture, sale or delivery resulting

from the differing methods of quantities in which such commodities are to such purchases sold or delivered ..." See also, Alhambra Motor Parts v. Federal Trade Commission, 309 F.2d 213 (9th Cir. 1962). The Warehouse Distributor Defendants are providing a bona fide service to the Manufacturer Defendants, which the Plaintiffs admit they cannot provide. If Plaintiffs do not provide the service, they cannot receive the benefit of the discount.

Alternatively, Plaintiffs seek to have this Court order the Warehouse Distributor Defendants to pass the functional discount they receive on to their customers. This is another form of resale price maintenance, which this Court declines to allow.

D. DIRECT SOLICITATION OF ORDERS; DIRECT PROVISION OF ADVERTISING MATERIALS; DIRECT NEGOTIATION OF PRICE CHANGES

Defendants have testified that there is some direct contact by their field representatives in the form of general promotion of their product lines, communicating new improvements, answering questions, working with a customer to solve a problem, suggesting inventory adjustments, advising of new part numbers, announcing new programs, and occasional educational clinics. These contacts enhance the overall market position of the Manufacturer Defendants on a regional level. These contacts do not establish that the Manufacturer Defendants control the resale of their products. Hiram Walker v. A. & S Tropical, Inc., 407 F.2d 4, 7 (5th Cir.1969), cert. denied, 396 U.S. 901, 90 S.Ct. 212,24 L.Ed.2d 177 (1969).

Plaintiff has argued that the Manufacturer Defendants do take purchase

orders directly from jobbers. Harold Daniels testified on deposition that manufacturer representatives from the various companies visit about once a year and seek orders for merchandise (p.246). Daniels testified that one Manufacturer Defendant shipped a product directly to him in the case of a changeover, but that there were no shipments on a regular basis (p. 258-259). Daniels further testified that the Manufacturer Defendants sell direct to him only through their representatives, the Warehouse Distributors. (p. 252). The Court is not persuaded that the regular practice of the Manufacturer Defendants is to take orders directly from the Plaintiffs, on the basis of the above testimony. Apart from an isolated "problem" situation, for example, the "changeover" involving direct shipment, the efforts of the Manufacturer

Defendants are confined to general promotional activities, designed to increase the market for their products as a whole, rather than to solicit individual orders.

Plaintiffs further cite the deposition of Bernard Ross, at pages 8, 9, 12 through 16, in which Mr. Ross states that the field representatives contact customers to promote and sell Wagner products through the customers of Wagner, that is, through the Warehouse Distributors. The Court finds that the testimony only establishes that the selling activities are designed to encourage the prospective customer to seek out that particular product line at the Warehouse Distributors, not to arrange an individual sale transaction direct from Manufacturer to jobber.

Plaintiffs have brought forth no

evidence that the M/D's directly participate in negotiation of price changes between the W/D's and Plaintiffs, nor that the field representatives of the M/D's direct the Plaintiffs to buy from a particular W/D.

Based on the foregoing, the Court concludes that Plaintiffs have not established the threshold requirement of a 2(a) claim, two sales to two purchasers. Plaintiffs have conceded there are not direct sales, and Plaintiff's attempt to invoke the indirect purchaser doctrine is not appropriate in this case. There is uncontroverted evidence that the Manufacturer Defendants do not control the price, terms or manner of the W/D's sales, nor do the Manufacturers own the Warehouse Distributors. There is no "dummy" entity or spurious intermediary involved in the subject transactions. The Court grants

summary judgment to the Manufacturer Defendants on this issue.

II. VIOLATION OF SECTION 2(F) - WAREHOUSE DISTRIBUTOR DEFENDANTS

A buyer who receives a price differential cannot be liable under the Robinson Patman Act unless the seller is in violation of the Act as well. Great Atlantic & Pacific Tea Co. v. F.T.C., 440 U.S. 69, 75-78, 99 S.Ct. 925, 930-31, 59 L.Ed.2d 153 (1979). As discussed above, Plaintiffs have failed to meet the threshold to establish seller liability. The Court finds there is no buyer liability under 2(f) for knowingly inducing or receiving an illegal price discrimination. Summary judgment is granted to the Warehouse Distributor Defendants on this issue. Accordingly, it is

ORDERED that Plaintiffs' motion for partial summary judgment is denied, and

the request for oral argument is denied; it is further

ORDERED that Manufacturer Defendants' motion for summary judgment is granted. It is further

ORDERED that Warehouse Distributor Defendants' motion for summary judgment is granted. It is further

ORDERED that all claims under Florida law are remanded for proceedings in State Court; it is further

ORDERED that the Clerk is directed to enter final judgment in favor of Defendants in final dismissal of this case.